

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of TASHANA LASHONDA SMITH
and TAMIA LANAYA SMITH, Minors.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

TIMOTHY SMITH,

Respondent-Appellant.

UNPUBLISHED

December 20, 2007

No. 278525

Oakland Circuit Court

Family Division

LC No. 06-719572-NA

Before: Murray, P.J., and Hoekstra and Wilder, JJ.

PER CURIAM.

Respondent appeals as of right from a circuit court order terminating his parental rights to the minor children pursuant to MCL 712A.19b(3)(b)(i), (g), (h), and (j). We affirm.

Respondent first contends that the trial court erred in proceeding to trial on the basis of an amended petition because he was not served with the amended petition before trial. Because respondent appeared at the trial and did not raise any objection to proceeding, he waived any defects in service. MCR 3.920(G).

Respondent next contends that he is entitled to a new trial due to ineffective assistance of counsel. A respondent has a right to the effective assistance of counsel in child protective proceedings. *In re CR*, 250 Mich App 185, 197-198; 646 NW2d 506 (2002). “[T]he principles of effective assistance of counsel developed in the context of criminal law apply by analogy in child protective proceedings.” *In re EP*, 234 Mich App 582, 598; 595 NW2d 167 (1999), overruled in part on other grounds by *In re Trejo*, 462 Mich 341, 353 n 10; 612 NW2d 407 (2000). But because respondent failed to raise this issue below in a motion for a new trial or request for an evidentiary hearing, our review is limited to mistakes apparent from the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

To prevail on a claim of ineffective assistance of counsel, a defendant must show that his counsel’s performance was objectively unreasonable and the representation was so prejudicial that he was deprived of a fair trial. To demonstrate prejudice, the defendant must show that, but for counsel’s error, there was a reasonable probability that the result of the proceedings would have been

different. This Court presumes that counsel's conduct fell within a wide range of reasonable professional assistance, and the defendant bears a heavy burden to overcome this presumption. [*People v Watkins*, 247 Mich App 14, 30; 634 NW2d 370 (2001), *aff'd* 468 Mich 233 (2003) (citations omitted).]

Respondent first argues that counsel was ineffective because he allowed the trial to proceed even though respondent had not been served with the amended petition. Respondent has not shown that the failure to serve him with a summons and amended petition divested the court of jurisdiction previously obtained by service of the summons and original petition for termination. Thus, he has failed to meet his burden of establishing a factual predicate for his claim of ineffective assistance. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Respondent next argues that counsel was ineffective because he made a limited closing argument at the dispositional hearing in which he did not specifically state that respondent's parental rights should not be terminated. The decision whether to address the court is a matter of trial strategy. *People v Harlan*, 129 Mich App 769, 778-779; 344 NW2d 300 (1983). "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999). Respondent killed the children's mother, conduct that "demonstrates a callous disregard for the welfare of one's children." *In re Mudge*, 116 Mich App 159, 162; 321 NW2d 878 (1982). Even accepting respondent's claim that counsel failed to present a compelling argument, respondent has not shown a reasonable probability that any argument counsel could have made was likely to affect the outcome of the proceedings.

Affirmed.

/s/ Christopher M. Murray
/s/ Joel P. Hoekstra
/s/ Kurtis T. Wilder